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CITATIONS

286402—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 660

BURLEY IRRIGATION DISTRICT, A CORPORATION,
PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 326–328) and of the court of appeals (R. 333–350) are not reported.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered September 30, 1940 (R. 351). The petition for writ of certiorari was filed December 30, 1940. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner is entitled to 95.6 percent of the profits realized upon the commercial sale of electricity generated by the Minidoka power plant. The plant, because irrigation needs came to absorb all of its firm power, also sold electricity furnished it by the Idaho Power Company in exchange for electricity received from the Black Canyon plant. Pursuant to the contract, the respondent credited the Black Canyon plant with $50,000 of the proceeds realized by the Minidoka plant from the sale of this electricity. The question is whether the respondent should instead have given petitioner credit for 95.6 percent of that sum.

STATUTES INVOLVED

The pertinent provisions of the Act of December 5, 1924, c. 4, 43 Stat. 672, 703, and the Act of May 10, 1926, c. 277, 44 Stat. 453, 480, are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

Petitioner is an Idaho corporation organized by water users on the lands of the Pumping Division of the Minidoka Reclamation Project (R. 173), a project instituted under the Reclamation Act[1] (R. 174).

The Minidoka power plant was constructed (R. 174) to furnish power for pumping water to lands within the project which could not be irrigated by

[1] Act of June 17, 1902, c. 1093, 32 Stat. 388, as amended.

gravity (R. 175). An appropriation of 2,700 second-feet was made for power purposes (R. 196–197). Upon the basis of use of power for pumping, 95.6 percent of the cost of the plant was assessed against the lands of the Pumping Division and 4.4 percent against the lands of the Gravity Division of the project (R. 40).

Construction of the plant was commenced in 1908; the first of six generating units was completed in 1909 and the last was completed in 1926. From an early date, the plant generated more power than was needed for pumping. Such surplus power was sold to residents on the project and in adjacent towns. These sales progressively increased and became correspondingly profitable. (See R. 336.)

By contract of March 15, 1926, the care, operation, and maintenance of certain of the works of the Pumping Division were transferred to the petitioner (R. 178). By a similar contract, the United States transferred certain of the works of the Gravity Division of the project to the Minidoka Irrigation District (R. 178–179), an Idaho corporation organized by water users on lands of that division (R. 174). However, the United States retained control of all the major works, including the power plant (R. 178).

In case of such a transfer, the accumulated net profits derived from the operation of project power plants are to be determined by the Secretary and credited to the obligations of the division involved.

Act of December 5, 1924, sec. 4, subsec. I, c. 4, 43 Stat. 672, 703; 43 U. S. C., sec. 501. The Act of May 10, 1926, directed specifically to the Minidoka project, also provides that the decision of the Secretary apportioning accumulated net profits shall be conclusive, c. 277, 44 Stat. 453, 480. Accordingly, the contract with petitioner provided that the Secretary would determine the total accumulated profits to be credited to the Minidoka project and the percentage of such profits which should equitably be credited to the lands of the Pumping and Gravity Divisions (R. 10–11).

Pursuant to the 1924 and 1926 Acts, Secretary of the Interior Work, on March 14, 1927, determined that the profits from the sale of power generated at the Minidoka plant should be credited to petitioner and the Minidoka district in the proportion that the costs of the plant had been assessed against the lands, i. e. 95.6 percent to the former and 4.4 percent to the latter (R. 68–69). Subsequently, Secretary Wilbur attempted to redetermine the percentage and to direct that petitioner be credited with only 72.7 percent of the profits and that the Minidoka district receive credit for the remaining 27.3 percent. Petitioner thereupon brought suit in the Supreme Court of the District of Columbia and obtained a permanent injunction prohibiting division of profits otherwise than as fixed by Secretary Work (R. 19–21). The court of appeals affirmed the decree. *Wilbur* v. *Burley Irrigation*

District, 58 F. 2d 871 (1932). The court held (pp. 873–874):

> This allocation of the cost of the power plant between the two districts, as found by Secretary Lane, was approved by Secretary Work, and the contracts entered into with the respective district corporations recognized and were based upon this division of costs and profits. The acts of 1924 and 1926, * * * under which Secretary Work proceeded, specifically prescribed that his decision should be conclusive and final. It is clear, therefore, that any attempt on the part of the present Secretary to revise, modify, or change these contracts is an interference with property rights already vested; a matter over which the jurisdiction of the Secretary no longer exists.
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> Where a final determination has been made and property rights as a result thereof have become vested, it is not within the jurisdiction of the determining Secretary or his successor in office to review or revise it, and any attempt at such action will be enjoined by the courts. * * *

The facts immediately pertinent to the present controversy were found by the trial court. In substance they are as follows:

Effective October 1, 1934 (R. 189) the respondent Secretary entered into a contract with the Idaho Power Company whereby the latter agreed to fur-

nish power to the Minidoka project. In partial consideration, the United States extended the life of an earlier contract under which the Idaho Power Company received power developed at the Government's power plant at Black Canyon, Idaho, on the Boise Reclamation Project. In effect, the transaction constituted an exchange of power (R. 181–182).

The contract was made in order to preserve the Minidoka plant's profitable power business and to save for irrigation water being wasted by the plant in the generation of power (R. 184). By 1935 the increasing demands during the irrigation season for pumping had absorbed the entire output of the plant (R. 183). Enlargement of the plant was not practicable (R. 188–189). Since consumers could not have been supplied during the irrigation period, those needing a constant supply of electricity throughout the year would have had to look elsewhere. The Minidoka district, a large consumer of the power, contemplated securing another source of supply (R. 189–190). Operation of the plant in the nonirrigation season was unprofitable. Sales could be made only to those who needed power for heating. Such power is sold at about one-fifth of the price paid for power for general purposes (R. 183). The receipts at such a price would produce no profit and would scarcely pay operating costs (R. 184).

Moreover, from 1931 to 1935 serious water shortages occurred on the project (R. 180) and severe

crop losses resulted (R. 181). In these years, the largest reservoir failed to fill. The operation during the winter months of the Minidoka plant for the generation of power contributed to this failure. There is no reservoir below the plant and consequently the water used by it in winter is lost for irrigation. The water thus annually wasted amounted to more than 225,000 acre-feet or about enough to irrigate the lands of the petitioner district (R. 181).

By means of the power brought in to the Minidoka project under the contract, the plant's profitable power business was preserved. Also, the United States discontinued winter production of power at the plant (R. 183). Thus, there was saved for irrigation in 1935 about 250,000 acre-feet of water (R. 184). Only by execution of the contract was it possible to accomplish these results (R. 188).

On March 12, 1936, the Secretary found that 1935 net profits from the sale of power amounted to $119,128.78 (R. 190–191). He determined that $66,744.26 thereof was derived from sale of power generated at the Minidoka plant. Accordingly, 95.6 percent of this sum was allocated to the petitioner (R. 191). He further determined that $50,000 of the remainder was attributable to profits from the Idaho Power Company and this sum he credited to the Black Canyon power plant in payment for the power furnished by it to the Idaho Power Company.[2]

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[2] The balance, $2,384.52, was credited to the Minidoka Irrigation District in compensation for a guarantee given by

On March 28, 1936, petitioner brought this suit to enjoin the respondent Secretary from crediting any of the $50,000 to the Black Canyon plant or otherwise than 95.6 percent to petitioner and 4.4 percent to the Minidoka district (R. 1–37). The trial court made findings of fact (R. 172–201) and conclusions of law (R. 201–208) and dismissed the complaint (R. 208–209). The court of appeals affirmed (R. 351), holding that the Secretary was authorized to shut down the power plant when it was not needed for irrigation purposes (R. 347–348) and that he rightly credited the Black Canyon plant with the $50,000 in payment for the power furnished by it to the Idaho Power Company (R. 348–349).

ARGUMENT

Petitioner contends (pp. 23–26) that, despite the legal title of the United States, it is the equitable owner of 95.6 percent of the power plant and of the appropriation of water made for power purposes. The contention is without substance. The claim in respect of the power plant is based (pp. 18–19, 23) upon *Wilbur* v. *Burley Irrigation District*, 58 F. 2d 871 (App. D. C., 1932). However, as the court below held in the instant case (R. 343–346), its earlier holding merely was that the Secre-

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that district to the United States that annual net revenues from sales in the district would amount to $50,000 (R. 189). Since petitioner did not make that district a party to this action, the validity of that credit is not here involved (See R. 342).

tary of the Interior was without jurisdiction to reconsider a determination which by the Acts of December 5, 1924, and May 10, 1926 (Appendix p. 11), was made conclusive and final.

Petitioner claims (pp. 6, 23–24) that the appropriation of water for power purposes is appurtenant to the power plant. But petitioner, since it has no equity in the plant, has no rights in the appropriation.

However, even if well-founded, petitioner's assertion of ownership would not tend to show that the courts below erred. Thus petitioner argues (pp. 18, 19, 25, 26) that, as equitable owner, it is entitled to the profits that would have been made if respondent had not shut down the plant. But it is plain that, if the plant had been operated, there would have been no profits. The trial court found (R. 183, 184–185, 193) that the production of power by the plant for commercial sale was unprofitable (see p. 6, *supra*). The court of appeals held (R. 339–340, 343, 347–348) that this finding was sustained by the evidence.

It is unnecessary, therefore, to consider petitioner's further contentions that in crediting the $50,000 to the Black Canyon power plant the respondent confiscated petitioner's property (pp. 26–28) and that it is entitled to that sum in compensation (pp. 28–29).

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.